

OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

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|--------------------|---|----------------------------------|
| RICK J. CUSUMANO, |) | No. ED102810 |
| |) | |
| Appellant, |) | Appeal from the Circuit Court of |
| |) | St. Louis County |
| vs. |) | 12SL-CC01524 |
| |) | |
| STATE OF MISSOURI, |) | Honorable Mark D. Seigel |
| |) | |
| Respondent. |) | Filed: August 2, 2016 |

Rick J. Cusumano appeals the denial of his Rule 29.15 motion for post-conviction relief. Cusumano asserts that the motion court clearly erred in failing to find that trial counsel's unreasonable and erroneous defense strategy—which involved counsel submitting lesser included offense instructions that waived the statute-of-limitations bar to Cusumano's ultimate convictions in this case, solely to support an untenable and largely unintelligible defense theory unsupported by Missouri law—constituted the ineffective assistance of counsel resulting in prejudice to Cusumano.

REVERSED AND REMANDED.

DIVISION THREE HOLDS: The motion court clearly erred when it failed to find that counsel rendered ineffective assistance resulting in prejudice to Cusumano. On this record, Cusumano has shown that counsel unreasonably waived Cusumano's right to be free from prosecution for the unclassified, lesser included felonies of forcible rape and forcible sodomy, of which he was ultimately convicted, by submitting instructions on those offenses *not* to offer the jury the opportunity to render compromise verdicts—to convict him without finding him guilty specifically of the greater, class A felony offenses with which he had been charged—but *solely* to, based on an unfounded and convoluted rationale, support an *illusory* statute-of-limitations defense to the *class A* felony charges against Cusumano.

Further, there is no question that Cusumano was prejudiced by counsel's pursuit of an unreasonable trial strategy. Because Cusumano was convicted here of the lesser included felonies on which counsel unreasonably submitted instructions, we find that there was not just a reasonable probability, but rather a certainty that but for counsel's unreasonable submission of those instructions—which waived the statute-of-limitations bar to Cusumano's convictions of the lesser included, unclassified felonies of forcible rape and forcible sodomy—the result in this case would have been different: Cusumano would not have been convicted of those time-barred, lesser included offenses.

Opinion by: James M. Dowd, J.

Robert M. Clayton III, P.J., and Lawrence E. Mooney, J., concur.

Attorney for Appellant: Amy E. Lowe

Attorney for Respondent: Karen L. Kramer

THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.